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No. 88-1797

In the Supreme Court of the United States

OCTOBER TERM, 1989

GOETHE HOUSE NEW YORK, GERMAN CULTURAL CENTER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked jurisdiction to review the National Labor Relations Board's direction of a representation election in a bargaining unit of petitioner's employees, where petitioner had an adequate means of obtaining review in the court of appeals under Section 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. 160(e) and (f).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 869 F.2d 75. The opinion of the district court (Pet. App. A16-A21) is reported at 685 F. Supp. 427. The underlying decision and direction of election by the Board (App., *infra,* 1a-15a) is reported at 288 N.L.R.B. No. 29.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1989. The petition for a writ of certiorari was filed on May 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Goethe House, is one of the six American branches of the Goethe Institute, a German nonprofit organization with 114 branches worldwide, which, under a contract with the Foreign Office of the Federal Republic of Germany (the Foreign Office), performs various functions in the area of German cultural foreign policy such as presenting and organizing cultural events, providing information on life in the Federal Republic of Germany, and promoting the German language. Petitioner's activities are controlled by the Foreign Office, and funding for the Goethe Institute is provided by the Federal Republic of Germany (App., *infra*, 3a-5a).

On March 5, 1982, District 65, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (District 65, or the Union) filed a representation petition seeking an election in a bargaining unit consisting of all employees of petitioner other than those represented by a German union,[1] excluding managerial, professional, and confidential employees, guards, and supervisors (App., *infra*, 3a, 14a). This unit includes a bookkeeper, assistant librarian, administrative assistant, and secretary (all in the Program Department), a messenger, a custodian, and a maintenance worker. All of these employees are either American citizens or third country nationals (App., *infra*, 5a & n.8).

In its Decision and Direction of Election issued on March 29, 1988, the Board found that petitioner's budget and operations indicated that it was engaged in commerce as defined in Sections 2(6) and 2(7) of the National Labor

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[1] Petitioner's employees who are German nationals are represented by a German union (App., *infra*, 3a n.4).

Relations Act, 29 U.S.C. 152(6) and (7)[2] (App., *infra,* 6a). The Board noted that it was not precluded from asserting jurisdiction over nonprofit educational institutions such as petitioner merely because they "do not engage in purely commercial activities" (App., *infra,* 6a n.9).

The Board dismissed petitioner's contention that its status as a foreign instrumentality excluded it from coverage under the Act (App., *infra,* 7a-13a). The Board found " 'no basis for believing that the Act was intended to exclude any employees in our country whose employer in this country is an 'employer' engaged in 'commerce' within the meaning of the Act' " (App., *infra,* 8a (citing *State Bank of India,* 229 N.L.R.B. 838, 841 (1977)). The Board distinguished *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros,* 372 U.S. 10 (1963), on the ground that in those cases the Court had "declined to construe the Act as extending to the internal operations of foreign flagships employing alien seamen only temporarily located in the United States" (App., *infra,* 8a).[3]

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[2] Section 2(6) of the Act provides in part:

> The term "commerce" means trade, traffic, commerce, transportation, or communication * * * between any foreign country and any State * * *.

Section 2(7) of the Act provides:

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

[3] The Board found more apposite *ILA Local 1416* v. *Ariadne Shipping Co.,* 397 U.S. 195 (1970), in which "the Court limited *Benz* and *McCulloch* to their facts in holding that a dispute centering on American longshoremen on American docks was outside the internal operations of the ship, and accordingly, was within the Board's jurisdiction" (App., *infra,* 8a-9a).

The Board then rejected petitioner's contention that its exercise of jurisdiction here would be inconsistent with the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602-1611 (1982) (FSIA). Following *State Bank of India,* 229 N.L.R.B. at 842, the Board held that the legislative history of the FSIA indicated Congress's intent to preserve immunity only for the "public acts" of a foreign state (App., *infra,* 9a-10a). In the Board's view, neither the policy of the NLRA nor any general public policy militated against the exercise of jurisdiction over instrumentalities of foreign states conducting commercial activities in the United States (App., *infra,* 9a).

The Board further noted that the FSIA explicitly denies immunity to any foreign state in any case in which "the action is based upon a commercial activity carried on in the United States by the foreign state" (App., *infra,* 10a & n.13). See 28 U.S.C. 1605(a)(2). The Board acknowledged that petitioner's purpose was to implement foreign policy objectives of the Federal Republic of Germany by providing cultural services. But it pointed out that "[t]he FSIA defines a 'commercial activity' as meaning 'either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to (its) *nature* * * * rather than * * * its *purpose*' " (App., *infra,* 10a-11a (quoting 28 U.S.C. 1603(d)) (emphasis added by Board, footnote omitted)). In support of its conclusion, the Board cited the House Report on the FSIA, which stated "that 'employment or engagement of laborers, clerical staff or public relations or marketing agents' by a foreign government is an activity included within the definition of 'commercial activity' " (App., *infra,* 11a (quoting H.R. Rep. No. 1487,

94th Cong., 2d Sess. 16 (1976)).[4]

The Board directed that an election be held within thirty days of the issuance of its decision (App., *infra,* 14a).

2. Petitioner filed a complaint in federal district court seeking declaratory and injunctive relief against the Board's assertion of jurisdiction and direction of election. The district court issued a preliminary injunction prohibiting the Board from proceeding further with the representation proceeding or conducting an election (Pet. App. A17-A21).

Initially, the district court addressed the question whether the case was governed by the general rule that in order to challenge a Board direction of an election, an employer must "allow[ ] the representation election to go forward and, in the event that the union should prevail, refus[e] to bargain with the union as a prerequisite to * * * review [in the court of appeals]" (Pet. App. A18). The court held that, despite this rule, it had jurisdiction to review the Board's decision under *McCulloch* v. *Sociedad National, supra,* since the employment activities of Goethe House were "controlled entirely by the West German government" and thus "[r]equiring Goethe House to submit to NLRB jurisdiction might well conflict or otherwise interfere with the German government's employment objectives in implementing cultural foreign policy" (Pet. App. A18-A19). This "entanglement", the court held, permitted district court review in advance of the representation election (*ibid.*).

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[4] Moreover, the Board noted, the same Report went on to say that "public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States" (App., *infra,* 11a, quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976)).

The court then found that petitioner would suffer irreparable harm if required to comply with the Board's direction of election "since Goethe House's employment policies are controlled entirely by the German government, and could engender diplomatic embarassment if the union prevailed in the election. Goethe House would be forced either to bargain with the union * * * or, alternatively, to obtain review it would have to commit an unfair labor practice under the National Labor Relations Act * * * " (Pet. App. A19).

Finally, the district court held that petitioner likely would prevail on the merits because, under the FSIA, the Board could not "intervene into the underlying employment structure of a conceded arm of a foreign state that is not involved in commercial activity" (Pet. App. A20). According to the district court, the commercial activity exception under the FSIA has been found to provide jurisdiction only "as to employment contracts between the foreign state or instrumentality and a single individual" (Pet. App. A20-A21).

3. A divided court of appeals, concluding that the district court lacked jurisdiction to review the Board's direction of election, reversed its decision (Pet. App. A3).

The court of appeals noted that there have been only two cases in which this Court has found district court jurisdiction to review a Board representation proceeding: *McCulloch* and *Leedom* v. *Kyne,* 358 U.S. 184 (1958) (Pet. App. A6). The court of appeals explained that the "extremely narrow [*Kyne*] exception to the general rule that Board representation orders are not subject to direct judicial review" applies "[o]nly where the Board has clearly violated an express provision of the [NLRA]" (Pet. App. A6-A7, quoting 2 *The Developing Labor Law* 1717 (C. Morris 2d ed. 1983)). Because petitioner alleged that the Board's action violated the FSIA, and not an express

provision of the NLRA, the *Kyne* exception did not apply here (Pet. App. A7).

Nor, according to the court of appeals, was there any basis for district court jurisdiction under *McCulloch* (Pet. App. A8-A9), where the international protest provoked by the Board's assertion of jurisdiction over foreign seamen serving on a Honduran flag vessel had justified the district court's pre-election review. In *McCulloch,* the certification of an American union as representative of those seamen would have violated Honduran law (Pet. App. A8); the court saw no comparable situation here, where certification of District 65 "would neither encroach on the membership of a German union nor violate German law" (Pet. App. A8-A9).

The court of appeals also found the district court's concern about international embarassment to be "largely unfounded" (Pet. App. A9). It noted that "[e]ven if the Union were certified as the bargaining agent of Goethe House's non-German employees," and Goethe House would therefore have to bargain with the Union over wages, hours and other terms and conditions of employment, "Goethe House would have no duty to bargain over how it performed its mission of promoting German culture" (Pet. App. A9). The court also noted that the fact that the German employees of Goethe House were already unionized "belie[d] the prospect that the presence of a union for the non-German employees would hamper Goethe House's operations" and made less than "uniquely compelling" the argument that the West German Government needed "unilateral control" over the remaining, non-unionized employees (Pet. App. A9-A10).

The court refused to predicate any prediction of international embarassment on the possibility that petitioner's employees, if found subject to the Board's jurisdiction, might strike and picket. The court noted that petitioner's

employees would have the right to strike and picket irrespective of Board jurisdiction, and that the right to organize might lessen, not heighten, the possibility of strikes and picket lines (Pet. App. A10-A11).

Finally, the court of appeals found that this case differed from *Kyne* and *McCulloch* because the petitioner would be able to obtain review of the Board's representation decision in a refusal to bargain proceeding (Pet. App. A12). In *McCulloch,* this Court ruled only on a case brought by a union (which would not have had recourse to review through a refusal to bargain proceeding) and declined to review a case brought by an employer (which had recourse to indirect review) (*ibid.*).[5]

Judge Lumbard dissented. In his view, *McCulloch* stood for the "broad premise that conflicts with foreign sovereigns are to be avoided," and thus the issue of petitioner's immunity from Board jurisdiction under the FSIA should be "resolved speedily" (Pet. App. A14).

ARGUMENT

The decision of the court of appeals is correct. The court's denial of pre-election judicial review under the circumstances of this case does not conflict with any decision of this Court or of any other court of appeals. The decision does not address the merits of the Board's assertion of jurisdiction. Further review at this stage is therefore unwarranted.

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[5] In *McCulloch,* this Court declined to decide a companion case (*Empresa Hondurena de Vapores, S.A.* v. *McLeod,* 300 F.2d 222 (2d Cir. 1962)), which had been brought by the foreign employer that had been a party to the Board proceedings. Instead, the Court vacated the court of appeals' decision in *Empresa* with instructions to have the district court dismiss the foreign employer's complaint "in light of [the] decision in [*McCulloch*]" (372 U.S. at 22).

1. Petitioner contends (Pet. 8-9) that the court of appeals erred in concluding that this case does not fit within the *McCulloch* exception[6] to the rule precluding pre-election judicial review.[7] As the court of appeals concluded, however, this case does not implicate the concerns that animated the Court to sustain district court review in *McCulloch*.

In *McCulloch*, the Board had directed an election to determine the representational rights of "foreign seamen aboard vessels under foreign flags" and the Board's action already had "aroused vigorous protests from foreign gov-

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[6] Petitioner correctly declines to press the claim that the Board acted in excess of its statutory mandate within the meaning of *Leedom* v. *Kyne* in exercising jurisdiction here. Nothing in the Act or its legislative history indicates that Congress intended to exempt from the Board's jurisdiction all activity in commerce by foreign nations. Section 2(2) of the Act, 29 U.S.C. 152(2), which defines "employer," does not exclude foreign nations or instrumentalities although it does exclude federal and state governments and instrumentalities. See *State Bank of India* v. *NLRB*, 808 F.2d 526, 530-532 (7th Cir. 1986), cert. denied, 483 U.S. 1005 (1987).

[7] Representation proceedings conducted under Section 9 of the Act, 29 U.S.C. 159, do not result in a final order that is subject to judicial review. *AFL* v. *NLRB*, 308 U.S. 401, 409 (1940); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964). Rather, certifications and other decisions issued in the course of such a representation case are subject to judicial review only in the courts of appeals and only in the context of a subsequent unfair labor practice proceeding – for example, when an employer refuses to bargain with the union certified by the Board and the Board finds that the refusal to bargain is an unfair labor practice under Section 8(a)(5) of the Act (29 U.S.C. 158(a)(5)) and issues a bargaining order. *Boire* v. *Greyhound Corp.*, 376 U.S. at 476-477. The final Board order in the unfair labor practice case is reviewable in the court of appeals, and the rulings made in the course of the underlying representation proceeding are reviewable in that context. Section 10(e) and (f) of the Act (29 U.S.C. 160(e) and (f)); *AFL* v. *NLRB*, 308 U.S. at 409; *Boire* v. *Greyhound Corp.*, 376 U.S. at 476-477.

ernments." The Court found that these circumstances presented "a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power" (372 U.S. at 16-17).[8]

For several reasons, there is no similar "uniquely compelling justification" for departing from the statutory review provisions in this case. First, the concerns that led the *McCulloch* court to find district court jurisdiction at the pre-election stage are not present here. Thus, the court of appeals rejected the suggestion that the holding of a Board-supervised election might "cause disturbances and embarassment in international relations" (Pet. App. A9). The Federal Republic of West Germany, by letter to the Board, has indicated that it believes that the Board lacks jurisdiction and has noted that an assertion of jurisdiction by the Board raises questions of reciprocity concerning employees of American institutions in Germany. See App., *infra,* 1a n.1. Immediate pre-election review is not necessary to deal with that objection, however. In fact, petitioner's German nationals are represented by a German union; District 65, if certified, could not require petitioner to bargain over how it performed its cultural mission; and according petitioner's non-German employees representational rights would not increase the likelihood

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[8] After the *McCulloch* Court determined that the district court had properly asserted jurisdiction, it held on the merits that "the jurisdictional provisions of the [NLRA] do not extend to maritime operations of foreign-flag ships employing alien seamen" (372 U.S. at 13). The Court noted that Congress and the State Department, as well as settled principles of international law, recognized that the law of the "flag state ordinarily governs the internal affairs of a ship" (*id.* at 20, 21). The Court found no indication that Congress intended the NLRA to supersede the law of the flag state with respect to the labor relations of foreign crewmen on a foreign vessel (*id.* at 20).

that they would engage in potentially embarrassing strikes and picketing, for they already are empowered to engage in such activity by state and federal law. Pet. App. A9-A12.

Second, in this case, unlike *McCulloch* and *Kyne,* petitioner has a means of obtaining review in the court of appeals through the statutory review procedure (Pet. App. A12-A13). Until that review is completed, petitioner would be under no compulsion to bargain with the Union (assuming the union won the election and were certified). Thus, petitioner's apprehension (Pet. 11) that "the Board [will] * * * become involved in matters that are exclusively the concerns of a foreign sovereign"—by forcing petitioner to bargain with an American union and to submit to grievance and arbitration proceedings—is premature. Nor should such indirect review of the ultimate issue whether the Board properly exerted jurisdiction here occasion embarrassment in foreign affairs (see Pet. 7). A so-called "technical" refusal to bargain is the recognized method for an employer to challenge a Board representation decision (see note 5, *supra*). Indeed, the court of appeals' opinion states that petitioner must follow that procedure in order to obtain review under the American legal system.

2. There is no merit to petitioner's further contention (Pet. 10-11) that the court of appeals should have upheld the district court's exercise of jurisdiction because the FSIA precluded the Board's assumption of jurisdiction over petitioner.

The FSIA does not provide that foreign instrumentalities have absolute immunity from all legal actions in the United States. The premise of the FSIA is that the courts will determine whether, in the circumstances alleged, a foreign instrumentality is immune from suit. "[I]n order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to

'assur[e] litigants that * * * decisions are made on purely legal grounds * * * ' the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agents, or instrumentalities." See *Verlinden B.V.* v. *Central Bank of Nigeria,* 461 U.S. 480, 488 (1983). Thus when a civil action is brought against a foreign instrumentality, the court must determine whether the suit is one permitted by the Act.

Nothing in the FSIA changes the scheme of review established by Congress for Board representation proceedings. Petitioner raised its FSIA contentions before the Board, which gave them full consideration (App., *infra,* 9a-13a). Petitioner will have an opportunity to obtain court of appeals review of the Board's rejection of its FSIA claims should the Union prevail in the representation election and a bargaining order issue against petitioner. Cf. *State Bank of India,* 808 F.2d at 534-535.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1989

APPENDIX

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

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288 NLRB No. 29 Case 2–RC-19263

GOETHE HOUSE NEW YORK, GERMAN CULTURAL CENTER, EMPLOYER

and

DISTRICT 65, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition for representation filed March 5, 1982, under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Wendell Shepherd on various dates between March 29 and April 27, 1982. Following the hearing and pursuant to the Board's Rules and Regulations, and by direction of the Regional Director for Region 2, this proceeding was transfered to the Board for decision. Thereafter, briefs were filed by the Employer and the Petitioner.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

On the entire record[1] in this case, the Board makes the following findings.

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[1] The Employer has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Ambassador to the United States of the Federal Republic of Germany submitted directly to the Board an "advisory opinion" in

I. The Board's Jurisdiction

The parties stipulated that the Employer, Goethe House New York, German Cultural Center, is one of 114 worldwide branches of the Goethe Institute located in Munich, Germany. The Goethe Institute is a nonprofit organization sponsored by the Foreign Office of the Federal Republic of Germany. Goethe House New York is a center for cultural, educational, and informational exchange. It performs these functions on behalf of the Federal Republic of Germany pursuant to an agreement between it and the Geothe Institute. The six branches of the Goethe Institute that operate in the United States, including Goethe House New York, have an annual aggregate budget in excess of $1 million, which is funded directly by the Federal Republic of Germany.

The Employer contends that the Board is without jurisdiction in this proceeding because it is an agency of the Federal Republic of Germany engaged in traditional sovereign activities of a noncommercial nature and thus is exempt from our jurisdiction under traditional international law principles of sovereign immunity, particularly as codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et seq. The Petitioner argues that the Employer is a private organization under German law and subject to the Board's jurisdiction. The Petitioner contends that such nongovernmental organizations funded in whole or in part by foreign governments are statutory employers because they do not fall within any of the ex-

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this matter on behalf of the Federal Republic's Foreign Office. We further acknowledge receipt from the Employer of a decision by the New York State Division of Human Rights declining to assert jurisdiction over the Employer.

ceptions contained in Section 2(2) of the Act.[2] The Petitioner relies on *State Bank of India*, 229 NLRB 838 (1977),[3] as followed in *German School of Washington, D.C.*, 260 NLRB 1250 (1982). The Petitioner seeks to represent all employees not otherwise covered by a collective-bargaining agreement with a German union[4] or any other union. The Petitioner further contends, contrary to the Employer, that there are no issues here with "sensitive" international or diplomatic ramifications.

For the reasons set forth below, we shall assert jurisdiction over the Employer's operations.

A. *The Nature of the Employer's Operations*

The record shows that Goethe House New York is one of six branches of the Goethe Institute located in the United States. Goethe House New York is not incorporated or licensed to do business in New York State. The Foreign Office of the Federal Republic of Germany has by contract[5] delegated to the Goethe Institute, a "registered society" under German law, and through it to Goethe

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[2] In defining the term "employer," Sec. 2(2) of the Act excludes, in relevant part, only the following governmental entities, "the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof . . . ."

[3] Hereinafter referred to as *State Bank of India I*. Subsequent to the transfer of this proceeding to the Board, the Board relied on *State [Bank of India] I* in deciding *State Bank of India*, 273 NLRB 264 (1984), and 273 NLRB 267 (1984), enfd. 808 F.2d 526 (7th Cir. 1986). We shall refer to the two latter cases as *State Bank of India II*.

[4] The employees of the Employer who are German nationals are represented for collective-bargaining purposes by a German union under German law.

[5] The current contract, or "Framework Agreement," was executed in 1976 for "an unspecified length of time." It may be terminated by either party "at the end of a year with twelve months notice."

House New York, several of its responsibilities in the area of German cultural foreign policy. These include presenting and organizing cultural events abroad, providing information abroad on cultural life in the Federal Republic of Germany, and promoting the German language abroad. As stipulated, other nations perform analogous functions directly through their foreign offices. The Employer's director testified that, while the Foreign Office retains responsibility for establishing and formulating cultural foreign policy, implementation of that policy has been delegated in part to the Goethe Institute. Each specific program proposed by Goethe House New York, for example, must first be submitted to the Federal Republic's New York Consulate, which has the authority to veto it. Further, essentially all funding for the Goethe Institute and its branches is derived from the Federal Republic of Germany. Goethe House New York engages in no fund raising activities in the United States and performs no services on behalf of any entity other than the Federal Republic of Germany.

Prior to the late 1960's the Foreign Office directly operated cultural centers in the United States. Since that time all such centers have been absorbed into the Goethe Institute. The Foreign Office, although retaining the authority to do so, has essentially ceased performing cultural functions not only in the United States but throughout the world. Senior officials of the Foreign Office and the Ministry of Finance are ex officio members of Goethe Institute's board of directors. Board decisions on who should be officers of the Institute and on policies viewed by the Foreign Office as impacting on German cultural foreign policy are subject to veto by the Foreign Office's representative.

To fulfill its mission, Goethe House of New York maintains a language department, cultural programs depart-

ment, and a library. The building in which these facilities are located is owned by the Federal Republic and Goethe House New York pays no rent. The mission of the language department is to provide information on teaching methods and materials and curriculum guidance to teachers of German. The cultural affairs department sponsors a wide ranging series of film showings, lectures, exhibitions, symposia, and similar events, many of which are cosponsored with American cultural organizations.[6] All Goethe House New York services and events, provided solely by it, including use of the 16,000 volume library, are available to the public free of charge.[7]

As set forth in the description of the stipulated unit in section III of this Decision and Direction of Election, the Petitioner seeks to represent essentially a residual unit of otherwise unrepresented employees.[8] Because, as noted at footnote 4 above, all employees who are German nationals are currently represented for collective-bargaining purposes by a German labor organization, the Petitioner's interest is only in employees who are either American citizens or third country nationals.

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[6] For example, Goethe House New York provided a grant of $5000 to a Seattle, Washington nonprofit theater group for its production of a German play. Also, Goethe House New York supported an exhibition by the International Center of Photography.

[7] Goethe House New York solicits a voluntary contribution of $1 from each filmgoer to defray costs to the film program. The money taken in through this effort amounts to approximately $1000 per year or less than .2 percent of the Employer's approximately $600,000-per-year budget for the New York operation.

[8] The Petitioner described the positions as the following: the bookkeeper, assistant librarian, administrative assistant in the Program Department, secretary in the Program Department, messenger, custodian, and maintenance person.

B. *The Board's Statutory Jurisdiction*

1. Monetary measure of the impact on commerce

At the hearing the parties entered into the following stipulation concerning the Employer's commerce statement:

> Goethe House New York, German Cultural Center, one of 114 branches of the Munich-based Goethe Institute for Promoting German Language Study Abroad and International Cultural Cooperation, is [a] nonprofit organization sponsored by the Foreign Office of the Federal Republic of Germany. Goethe House New York operates a center for cultural exchange and educational purposes and information. Goethe House New York performs these functions on behalf of the German government, pursuant to an agreement between the Goethe Institute and the Federal Republic of Germany. The six branches of Goethe Institute, including Goethe House New York, which operate in the United States, have an annual aggregate budget in excess of $1 million, all of which is derived from sources outside the State of New York, namely the Federal Republic of Germany.

These stipulated facts are sufficient to warrant our finding that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Employer's operations in the United States generally and at its New York, New York facility in particular are like those of a library and also similar to a foundation or educational institution contributing to the cultural and educational values of the community.[9] Although the

[9] In this regard, in *German School,* supra, 260 NLRB at 1252, the Board stated that it is not precluded from asserting jurisdiction over a nonprofit educational institution despite the fact that such institutions do not engage in purely commercial activities.

record does not establish any precise figures on direct or indirect inflow or outflow of goods or services, the receipt by Goethe Institute in the United States of more than $1 million directly from the Federal Republic of Germany meets the Section 2(6) test of commerce between "any foreign country and any State."[10] This demonstrates a substantial effect on commerce and establishes the required statutory jurisdiction of the Board. Further, because the stipulated receipt by the Employer of $1 million from the Federal Republic of Germany meets the Board's standard for assertion of jurisdiction regardless of which discretionary test is used, we find it unnecessary to decide which test is controlling.

2. Congressional intent respecting coverage of foreign instrumentalities as employers

The Employer contends that its status as a foreign instrumentality somehow excludes it from the coverage of the Act. We reject this contention. It is clear that the Employer does not come within any express statutory exclusion (see fn. 2, above, and *State Bank of India I*, 229 NLRB at 840).

The Employer argues, however, that given the record evidence that Goethe House New York, as a branch of the Goethe Institute, operates essentially as an administrative arm of the Federal Republic under the overall supervision of the Foreign Office the Employer is engaged in diplomatic activities of a sort that take it outside the reach of the Act as intended by Congress. In particular, the Employer relies on a series of cases dealing with foreign flagships, notably *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957); and *McCulloch v. Sociedad Nacional*

[10] As indicated above, the record shows that Goethe House New York's annual budget is approximately $600,000.

de Marineros, 372 U.S. 10 (1963), in which the Supreme Court declined to read the Act as extending to certain maritime operations of foreign flagships because, in the absence of an affirmative indication of congressional intent, it could not assume that Congress would have meant to authorize Board inquiries that would, of necessity, involve the "internal discipline and order" of a foreign vessel. *McCulloch*, supra, 372 U.S. at 19. For the reasons set out below, we find that the *Benz-McCulloch* rule does not apply here.

As the Board stated in *State Bank of India I,* discussed more fully below, the Board recognizes the canon of statutory construction that the Act is to be construed as "applying generally only to conduct taking place within, or having effect within, the territory of the United States." 229 NLRB 838, 841. It went on to state that "[w]ithin these boundaries, there is no basis for believing that the Act was intended to exclude any employees in our country whose employer in this country is an 'employer' engaged in 'commerce' within the meaning of the Act." Id. Thus, the Supreme Court in *Benz* and *McCulloch* declined to construe the Act as extending to the internal operations of foreign flagships employing alien seamen only temporarily located in the United States. The court of appeals, in enforcing *State Bank of India II,* pointed out (supra, 808 F.2d at 533-534) that the Supreme Court itself has narrowly construed the *Benz-McCulloch* rule in another case regarding the Board's jurisdiction over a foreign flagship, *Longshoremen ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970). In that case the Court limited *Benz* and *McCulloch* to their facts in holding that a dispute centering on American longshoremen on American docks was outside the internal operations of the ship, and accordingly, was within the Board's jurisdiction. *Ariadne* lends further support to our decisions in *State Bank of*

India I and *II* and to our holding in this case, where the activities of the Employer over which we have been requested to assert jurisdiction occur solely within the territory of the United States.

C. *The Board's Exercise of Discretionary Jurisdiction*

Having decided that the Board has jurisdiction under Section 2(2), (6), and (7) of the Act, we turn to the Employer's argument that the assertion of jurisdiction would nevertheless be wholly inconsistent with longstanding international law concepts of sovereign immunity and, in particular, contrary to the intent of the Foreign Sovereign Immunities Act (FSIA). This argument goes to whether, in our discretion, we should decline to exercise jurisdiction that we possess under the Act (i.e., the NLRA). In *State Bank of India I*, the Board considered both the policy of the Act and public policy with respect to foreign sovereign immunity and found no justification to decline jurisdiction over an employer which is an "instrumentality" of a foreign state in cases "affecting employees in our own country whose employer engages in commercial activity which meets the Board's jurisdictional standards for such enterprises." 229 NLRB at 842. For the reasons set forth below we find that *State Bank of India I* is controlling here.

Although the argument has been made that all acts of foreign states and their agents be accorded sovereign immunity, the Congress has explicitly rejected this absolute immunity doctrine. The legislative history of the FSIA indicates that the Act was introduced in accordance with the recommendations of the Departments of State and Justice, that it exhaustively considered the competing foreign policy concerns, and that it intended that sovereign immunity be granted only to the public acts of a

foreign state.[11] Although the FSIA was written to apply only to judicial proceedings, we see no basis for our substituting a contrary judgment on sovereign immunity claims made during the course of administrative proceedings before this Agency, particularly where such proceedings ultimately are subject to court view by the Federal courts of appeals, in which the FSIA is fully applicable.

Accordingly, we shall continue to follow the principles established in *State Bank of India I* for resolving sovereign immunity claims where the employer is otherwise engaged in commerce within the meaning of Section 2(2) and (6) of the Act. Thus, although we do not dispute the Employer's claim that it is an agency or instrumentality of the Federal Republic of Germany, and thus within the meaning of a "foreign state" as defined by the FSIA,[12] this alone is not sufficient to establish an unrestricted entitlement to sovereign immunity. In relevant part, the FSIA states that a foreign state shall not be immune in any case in which "the action is based on a commercial activity carried on in the United States by the foreign state."[13] The FSIA defines

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[11] H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7 (1976), reprinted in 1976 U.S. Code Cong. and Ad. News 6604-6605. Because there was no conference committee report and the House bill was passed in lieu of the Senate bill, subsequent references will be to the House Report.

[12] Under Sec. 1603(b) of the FSIA, an "agency or instrumentality" is any entity which is a "separate legal person, corporate or otherwise," an "organ of a foreign state," and not incorporated in a State of the United States or "created under the laws of any third country." Goethe House New York, as a private society under German law which is not incorporated in any State of the United States and which acts as the exclusive contractual agent of the German government to carry out activities in conformity with the German government's cultural foreign policy meets all of these tests.

[13] Sec. 1604 [*sic*].

a "commercial activity" as meaning "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to (its) *nature* . . . rather than . . . its *purpose*."[14] (Emphasis added.)

The legislative history of the FSIA provides further guidance to the proper meaning of "commercial activity" and indicates that the statute was intended to deny sovereign immunity to certain labor disputes involving foreign government employers. First, the House Report on the FSIA[15] states that "employment or engagement of laborers, clerical staff or public relations or marketing agents" by a foreign government is an activity included within the definition of "commercial activity." An even stronger indication is the following statement in the House Report: "Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States."[16]

As set forth elsewhere in this Decision and Direction of Election,[17] the employees for whom the Petitioner had filed a representation petition fit almost exactly within these examples of nonexempt "commercial activity" under the FSIA. The Petitioner specifically does *not* seek to represent those employees of Goethe House New York who are German nationals, some of whom carry diplo-

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[14] Sec. 1603. For the purpose of construing the meaning of "commercial activity" within the meaning of the FSIA in order to give proper effect to sovereign immunity claims under that Act, we note that this term need not be identical in meaning of the terms "commerce" and "affecting commerce" under Sec. 2(6) and (7) of our Act.

[15] H.R. Rep. No. 94-1487, supra at 16 (1976).

[16] Id.

[17] See secs. I,A and III.

matic passports, and are subject to German labor laws covering union representation and collective bargaining. The unit petitioned for covers only those employees, most of whom are in clerical or maintenance positions, who are either "American citizens or third country nationals." Thus, under the facts of this case, we find that Congress intended that the Federal Republic of Germany not be entitled to sovereign immunity for the "commercial activity" of employing the employees at issue in this case.

We do not question the Employer's claim that its overall purpose in directly providing cultural service and of subsidizing the cultural programs of American employers is to implement certain foreign policy objectives of the Federal Republic. Further, we agree that the employees whom we now hold are entitled to the protection of the Act provide services in support of those diplomatic aims. However, entitlement to sovereign immunity depends on the nature, not the purpose of the activities in question. 28 U.S.C. § 1603(b). The records shows that Goethe House New York carries out its functions by, in addition to employing the employees discussed above, purchasing office supplies, books, and periodicals for its library and language department. It enters into contracts, or "letters of agreement," with American cultural institutions, such as museums, theaters, film societies, and universities to provide financial support for specific programs which it cosponsors. In all these activities Goethe House New York acts as a commercial entity, not as a sovereign.[18]

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[18] The House Report indicates that 'the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. . . . Such contracts should be considered to

We conclude that our determination of the Employer's sovereign immunity claim, made in conformance with the FSIA, effectuates the policies of both the Act and the FSIA. Thus, in asserting jurisdiction over the Employer, we reject the Employer's claim that we are acting contrary to the "intent" of the FSIA. Rather, we act in accordance with the principles of sovereign immunity codified in the FSIA.[19]

II. The Labor Organization

District 65, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. The Appropriate Bargaining Unit

At the hearing the parties stipulated, and accordingly we find, that the following employees constitute a unit ap-

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be commercial contracts, even if their ultimate object is to further a public function." H.R. Rep. No. 94-1487, supra at 16.

[19] Because the Federal Republic of Germany is not an exempt entity within the meaning of Sec. 2(2) of the Act and because it is not entitled in this case to sovereign immunity under the FSIA, we find it unnecessary to determine whether assertion of jurisdiction is appropriate under the doctrine relating to exempt entities set forth in *National Transportation Service,* 240 NLRB 565 (1979). In *Res-Care, Inc.,* 280 NLRB No. 78 (June 24, 1986), we clarified the principles of that case and reaffirmed its basic test for determining when assertion of jurisdiction over an employer providing services to an "exempt" entity is appropriate. We therefore also find it unnecessary to rely on the *National Transportation* analysis in *German School of Washington, D.C.,* 260 NLRB 1250 (1982).

propriate for the purpose of collective bargaining within the meaning of the Act.

> All employees employed by Goethe House New York, German Cultural Center, excluding those employees covered by collective bargaining agreements with a German union or any other union, managerial employees, professionals, confidential employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be held among the employees in the unit found appropriate, as early as possible but not later than 30 days from this date. The Regional Director shall supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before this date, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by District 65, International Union, United Aerospace and Agricultural Workers of America (UAW), AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C., March 29, 1988

James M. Stephens, Chairman

Marshall B. Babson, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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